SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 129

MARJORIE FLEMING LLOYD-SMITH,
Petitioner,

vs.

DONALD BICKNELL, Receiver of the Bank of Saginaw, Saginaw, Michigan.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 129

MARJORIE FLEMING LLOYD-SMITH,

vs.

DONALD BICKNELL, RECEIVER OF THE BANK OF SAGINAW, SAGINAW, MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Marjorie Fleming Lloyd-Smith respectfully shows:

I. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment entered in that court on March 7, 1940 (R. 41-42). The opinion (R. 37-41) is reported in 109 F. (2d) 527.

II. The question which petitioner seeks to have this Court review is whether a receiver appointed by the Michigan

Banking Commissioner (under a statute which did not vest such receiver with title to the assets) could sue in the Federal court held in New York, or whether it was first necessary that an ancillary receiver be appointed in New York. In view of the practice established by this Court in *Booth* v. *Clark*, 17 How. 322 (1854) and later decisions, the question becomes this:

Should the new Federal Rules of Civil Procedure be interpreted as changing the established practice of not permitting a foreign receiver (having merely possession and not vested with title to the cause of action) to maintain a suit in a Federal court, and requiring that an ancillary receiver be first appointed?

III. This was an action at law brought in the United States District Court for the Eastern District of New York by the respondent Donald Bicknell, Receiver of the Bank of Saginaw, Saginaw, Michigan, against your petitioner, Marjorie Fleming Lloyd-Smith. The cause of action was based on an alleged guaranty of an issue of corporate bonds (R. 4-6). Although your petitioner asserted several defenses on the merits (which are omitted from the record), the present petition does not involve any of these questions, but relates solely to a single question whether the Michigan receiver can sue in the Federal court in New York or whether there must first be an ancillary appointment.

The relevant allegations of the second amended complaint were:

That the Bank of Saginaw purchased the bonds in April, 1927 and has since continued to be the owner and holder of the same; and that a cause of action upon the guaranty arose in 1932; and

That in 1936, in accordance with Act No. 32 of the Public Acts of the State of Michigan of 1933, the Commissioner of the State Banking Department duly appointed the respondent, Donald Bicknell, as Receiver for the Bank of Saginaw,

a banking corporation of the State of Michigan, a copy of the order of appointment (R. 8-12) being annexed to the complaint; that the said bank had not been dissolved nor its corporate existence ended, but that it was still operating under receivership (R. 3-5).

The amended answer alleged as an affirmative defense that title to the alleged cause of action had not been transferred to or vested in said respondent, the Michigan receiver, and that no steps had been taken for the appointment of an ancillary receiver in New York (R. 19-20).

IV. Upon these undisputed facts, your petitioner moved for judgment on the pleadings, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure (R. 21-22). The District court granted this motion, basing its decision upon the well-settled practice in the Federal courts and citing *Booth* v. *Clark, supra,* and other decisions of this Court (R. 23-29).

V. The respondent appealed to the Circuit Court of Appeals for the Second Circuit (R. 32). The appeal came on for hearing before the Circuit Court of Appeals, which reversed the judgment of the District court (R. 41-42) and declared in its opinion (R. 37-41) that the practice established by this Court had been changed by Rule 17 (b) of the Federal Rules of Civil Procedure and that, under the new Rule, even a foreign receiver not vested with title to the cause of action can sue in a Federal court held in a State which permits such a receiver to sue.

VI. The reasons why this Court should grant the writ of certiorari are:

The decision of the Circuit Court of Appeals is in conflict with the previous decisions of this Court, from *Booth* v. *Clark, supra,* decided in 1854, down to *McCandless* v. *Furlaud,* 293 U. S. 67, decided in 1934.

The decision below is in conflict with new Rule 66 which provides that the practice in receiverships shall continue to be as heretofore followed. Furthermore, it establishes a novel and extraordinary distinction between receivers according to the sources of their appointment, with the result that an *ex parte* appointment by an administrative officer is given greater extra-territorial effect than an appointment by a court.

The decision of said Circuit Court of Appeals abolishes a rule of Federal practice which has been firmly established by decisions of this Court for nearly a century, and also overrides new Rule 66; and it does this by erroneously construing and applying new Rule 17 (b) which does not relate to receiverships but is the general provision as to the capacity of individuals, partnerships and other parties to sue.

This is the first construction of Rule 66 and also the first application of Rule 17 (b) to a receivership. In view of the number of receiverships and actions involving the question of the right of foreign receivers to sue, it is submitted that the question in this case is important and requires an authoritative and elucidating decision from this Court. Otherwise, there will be confusion and uncertainty in the Federal practice with regard to suits by foreign receivers.

WHEREFORE, for reasons stated more fully in the annexed brief, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this cause, being Number 220 on its calendar for the October Term, 1939, to the end that the case may be reviewed and

determined in this Court as provided in Title 28, Section 347 of the Code of Laws of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Second Circuit may be reviewed by this Court and may be reversed, and your petitioner prays for such other and further relief as to this Court shall seem just and proper; and your petitioner will ever pray.

Dated, New York, N. Y., May 31, 1940.

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Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 129

MARJORIE FLEMING LLOYD-SMITH,
Petitioner,

vs.

DONALD BICKNELL, RECEIVER OF THE BANK OF SAGINAW, SAGINAW, MICHIGAN.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The opinion of the District Court (R. 23-28) is reported in 29 F. Supp. 929.

The opinion of the Circuit Court of Appeals (R. 37-41) is reported in 109 F. (2d) 527.

The statement of the case appears in the foregoing petition.

Jurisdiction.

The order for mandate of the Circuit Court of Appeals was entered on March 7, 1940 (R. 42). The time to apply for a writ of certiorari, therefore, runs from that date.

The jurisdiction of this Court is invoked under 28 U. S. C. § 347.

Question Involved.

The question presented is whether the new Federal Rules of Civil Procedure should be interpreted as changing the practice established by this court in *Booth* v. *Clark*, 17 How. 322 (1854) and other decisions of not permitting a foreign receiver to maintain a suit in the Federal court and requiring that an ancillary receiver be first appointed.

Specifications of Error.

1. The Circuit Court of Appeals erred in disregarding the prior controlling decisions of this Court.

2. The Circuit Court of Appeals erred in holding that Rule 17(b) of the Federal Rules of Civil Procedure abolishes the long established rule of the Federal courts of not permitting a foreign receiver (who is not vested with title to the cause of action) to maintain suit and requiring that an ancillary receiver be first appointed.

3. The Circuit Court of Appeals erred in holding that Rule 66 of the Federal Rules of Civil Procedure does not preserve the established practice as to a foreign receiver appointed by an administrative officer of a State.

4. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is in conflict with the prior decisions of this Court which for nearly a century have established and upheld the Federal practice of not permitting a foreign receiver to maintain suit, unless

he is a "universal successor" vested with title to the cause of action.

The rights alleged in the complaint were acquired by the Bank of Saginaw, Saginaw, Michigan, in 1927 and the cause of action arose in 1932 (R. 4-5). Respondent Bicknell was appointed in Michigan as receiver for the bank in 1936 (R. 3-4). He did not get title to the assets, and the bank was not dissolved.

In August, 1938, without obtaining an ancillary appointment, he came to New York and commenced the present suit.

Under these facts, the long settled practice in the Federal courts has been to refuse to allow the foreign receiver to sue and to require that there be a duly appointed ancillary receiver subject to the control of the local court. This practice was established by this Court in 1854 by its decision in *Booth* v. *Clark*, 17 How. 322. It has been constantly followed.

Great Western Mining & Manufacturing Company v. *Harris*, 198 U. S. 561 (1905);
Keatley v. *Furey*, 226 U. S. 399 (1912);
Sterrett v. *Second National Bank*, 248 U. S. 73 (1918);
Lion Bonding Company v. *Karatz*, 262 U. S. 77 (1923);
McCandless v. *Furlaud*, 293 U. S. 67 (1934).

The decision of the Circuit Court of Appeals in the present case is in conflict with the above decisions of this Court.

The Federal decisions make no distinction between a receiver appointed under general equity powers and a receiver appointed under statutory provisions.

There is only one exception where this Court has held that an ancillary appointment is not required, and that is where a statute constitutes the receiver the "universal successor" of the corporation, vesting him with title to the assets. In the present case the District Court held that the Michigan statute did not vest the respondent with such title

(R. 26-28), and the Circuit Court of Appeals assumed this to be true, after quoting the relevant statutory language (R. 37-38).

The Federal practice of requiring an ancillary appointment is so firmly settled that this Court stated that it could be changed only by legislation, saying in *Sterrett* v. *Second National Bank,* 248 U. S. 73 (1918):

> "* * * The system established in Booth *v.* Clark has become the settled law of the federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action" (P. 77).

The statement had previously been made by this Court in *Great Western Mining Co.* v. *Harris,* 198 U. S. 561 (1905).

II.

In the adoption of the new Federal Rules of Civil Procedure there was no intent to change the practice established by the decisions of this Court.

The District Court held that under the practice established by this Court the Michigan receiver could not maintain the present suit, and the District Court further held that the new Federal Rules did not effect any change in this matter.

Although *Booth* v. *Clark, supra,* and the other decisions of this Court listed on page 10 above were emphasized in petitioner's brief and oral argument in the Circuit Court of Appeals, the opinion of that court does not even refer to any of those decisions and so far as can be told from the opinion they were not taken into consideration. Instead, the opinion plunges directly into a discussion of Rule 17(b).

On our present question the new Rules should not be read *in vacuo*, but they should be read in the light of the many decisions of this Court covering the very question here involved. We submit that nowhere can any indication be found which shows that the new Rules were intended to change the effect of those decisions.

There are only two Rules which need to be considered. One is Rule 17(b), containing the general provision as to capacity to sue and reading as follows:

> "(b) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

The other is Rule 66, which is the only Rule relating to receivers and which reads as follows:

> "*Rule 66. Receivers.* The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."

Rule 66 cannot have been intended to effect any change, for, by its very terms, it is a simple declaration that the practice as to receivers is not to be changed by the new Rules.

It seems to be equally true that in adopting Rule 17(b) there was no intent to effect any change in the established practice as to matters similar to the present one. We cannot find, either in the notes of the Advisory Committee or in the discussions before the House Judiciary Committee, any suggestion that Rule 17(b) was intended to change the existing law; and there is some affirmative indication that it was not intended to change the existing law. (Hearings Judiciary Committee, House of Representatives, 75th Congress, Third Session, on Rules of Civil Procedure for the District Courts, p. 108.)

In "Moore's Federal Practice Under the New Federal Rules", Vol. II, pp. 2088-91, our specific question is discussed and the authors state that the need for change as to the practice curtailing the extra-territorial powers of receivers was urged upon the Committee but that it is not believed that any change was made. The authors close their discussion of our specific question by quoting Rule 66 and stating:

> "This adopts the well-settled federal rules on primary and ancillary receivers, and the capacity of the chancery receiver as hereinabove discussed, and should prevail over the generality of Rule 17 (b)." (at p. 2091)

III.

The decision of the Circuit Court of Appeals is in conflict with the prior decisions of this Court which show that the curtailment of extra-territorial powers of receivers is not a matter of capacity to sue.

The Circuit Court of Appeals, in holding that the present question was to be governed by Rule 17(b) and not by Rule 66, held that this was a mere question of capacity to sue and was not a matter of receivership administration. In arriving at this result the Circuit Court of Appeals

is in conflict with the decisions of this Court, particularly *McCandless* v. *Furlaud, infra.* Indeed, the court below failed to discuss or even to cite the prior decisions of this Court.

The decisions of this Court clearly show that the requirement that an ancillary receiver be appointed, has always been regarded as a matter of receivership administration. In the case which first established the practice, *Booth* v. *Clark,* 17 How. 322 (1854), this Court stated at p. 338:

> "* * * we think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability."

Again, in *Great Western Mining Co.* v. *Harris,* 198 U. S. 561 (1905), this Court referred to the doctrine of *Booth* v. *Clark* and, after quoting the above language, this Court said:

> "It is doubtless because of the doctrine therein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with a view of vesting control of property rights in the court in whose jurisdiction they are located." (p. 577)

Finally, in its most recent pronouncement with respect to suits by foreign receivers in *McCandless* v. *Furlaud*, 293 U. S. 67 (1934) (where this Court reversed a decision of the Circuit Court of Appeals for the Second Circuit), this Court said:

> "*Great Western Mining Co.* v. *Harris*, 198 U. S. 561, 576, shows that the rule of *Booth* v. *Clark* rests upon practical considerations." (p. 76)

The opinion written by Mr. Justice Brandeis in the *McCandless* case states in so many words that the question raised in our present case is not a matter of capacity to sue. The facts were as follows: McCandless had been appointed receiver in Pennsylvania. He then came into the Federal court in New York and obtained an ancillary appointment. Then, as the ancillary receiver, he brought suit in the United States District Court for the Southern District of New York. He obtained a judgment and the defendant appealed. Upon the appeal, the defendant attempted for the first time to question the regularity of the ancillary appointment. This Court held that, where there had been an ancillary appointment, the validity of such appointment could not be raised for the first time upon appeal. Mr. Justice Brandeis said:

> "But an objection to the plaintiff's legal capacity to sue will not be entertained if taken, for the first time, in the appellate court." (p. 73)
>
> "The alleged invalidity of the order appointing McCandless ancillary receiver is a defect of this character. * * * The objection sustained goes * * * to the legal capacity of the plaintiff as ancillary receiver." (pp. 74-75)

This opinion carefully distinguished the question involved in the *McCandless* case from the situation involved in *Booth* v. *Clark, supra,* as follows:

> "The objection which the Court of Appeals held fatal to the maintenance of this suit differs in essence from that sustained in *Booth* v. *Clark*. There, the foreign equity receiver suing in the federal court of another State failed because, having no title to the assets within the district, he was without a cause of action. He lacked title because the order appointing him did not, and could not, transfer to him the assets involved in the litigation. For that reason, a bill in the federal court for southern New York brought by the primary receiver, alleged to have been duly appointed in Pennsylvania and authorized to bring this suit, would have been bad on demurrer. But this bill by the ancillary receiver, which alleges that he had been duly appointed by the federal court for New York and authorized to bring the suit, would have been good on demurrer" (p. 75).

We submit, therefore, that the *McCandles* case and the other decisions of this Court show clearly that the doctrine of *Booth* v. *Clark* is not a matter of capacity to sue, and that the present matter cannot be governed by Rule 17 (b). That being true, it does not matter whether Rule 66 affirmatively covers it or whether the new Rules are to be regarded as entirely silent upon this matter. The result is the same in either case, that is to say, the long-established Federal practice remained unchanged by the adoption of the new Rules.

It may also be noted that the New York decisions cited in the opinion of the Circuit Court of Appeals in themselves show that a foreign receiver cannot sue as a matter of right. The place where the New York and Federal courts disagree is upon the question whether it is sound practice in receivership administration to permit suit as a matter of comity without ancillary appointment.

IV.

The court below erroneously construed Rule 66 and created a novel and extraordinary distinction between a receiver appointed by a court and a receiver appointed by a State administrative officer.

The court below devoted a goodly portion of its opinion to a discussion of the verbal niceties in Rule 66. In this connection, it might possibly be worth noting that the court's opinion inadvertently fails to quote the language exactly.

Even as a matter of literal construction we will be prepared to argue that the court's interpretation was erroneous. But we don't believe that the application of Rule 66 is to be regarded as an exercise in English rhetoric. Moreover, as we state above, we do not believe it matters whether Rule 66 covers the present question or whether the new Rules are entirely silent.

The necessary effect of the decision of the Circuit Court of Appeals is to create a distinction between two receivers who possess identical powers and neither of whom is vested with title. This distinction arises solely by reason of the appointment of one receiver *ex parte* by a State administrative officer. Such receiver, solely by reason of such appointment and not by reason of any provision of the statute under which he was appointed, would be given greater extra-territorial powers than the decisions of this Court or the opinion below give to a receiver who has received a regular judicial appointment by a court of competent jurisdiction. Any such doctrine or distinction is entirely novel. We are not able to find anything in the prior decisions of this Court to suggest a justification for it. Moreover, it is a rather extraordinary result, that a receiver should be given greater extra-territorial powers merely because he had

an administrative appointment rather than a judicial appointment.

Conclusion.

We hardly need to point out that the administration of receiverships is an important activity of the Federal courts. The practice controlling the present question as to a suit by a foreign receiver was established by the decision of this Court in 1854 and has been followed in many later decisions by this and other courts. The decision below, without citing or discussing those decisions, upsets this established practice and creates a novel distinction between a receiver appointed by administrative action and a receiver appointed by judicial action.

We submit that the decision below will produce uncertainty and confusion and that it should be reviewed by this Court.

The petition for a writ of certiorari should therefore be granted.

Dated, May 31, 1940.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

No. 129

MARJORIE FLEMING LLOYD-SMITH,
Petitioner,

against

DONALD BICKNELL, Receiver of the Bank of Saginaw, Saginaw, Michigan,
Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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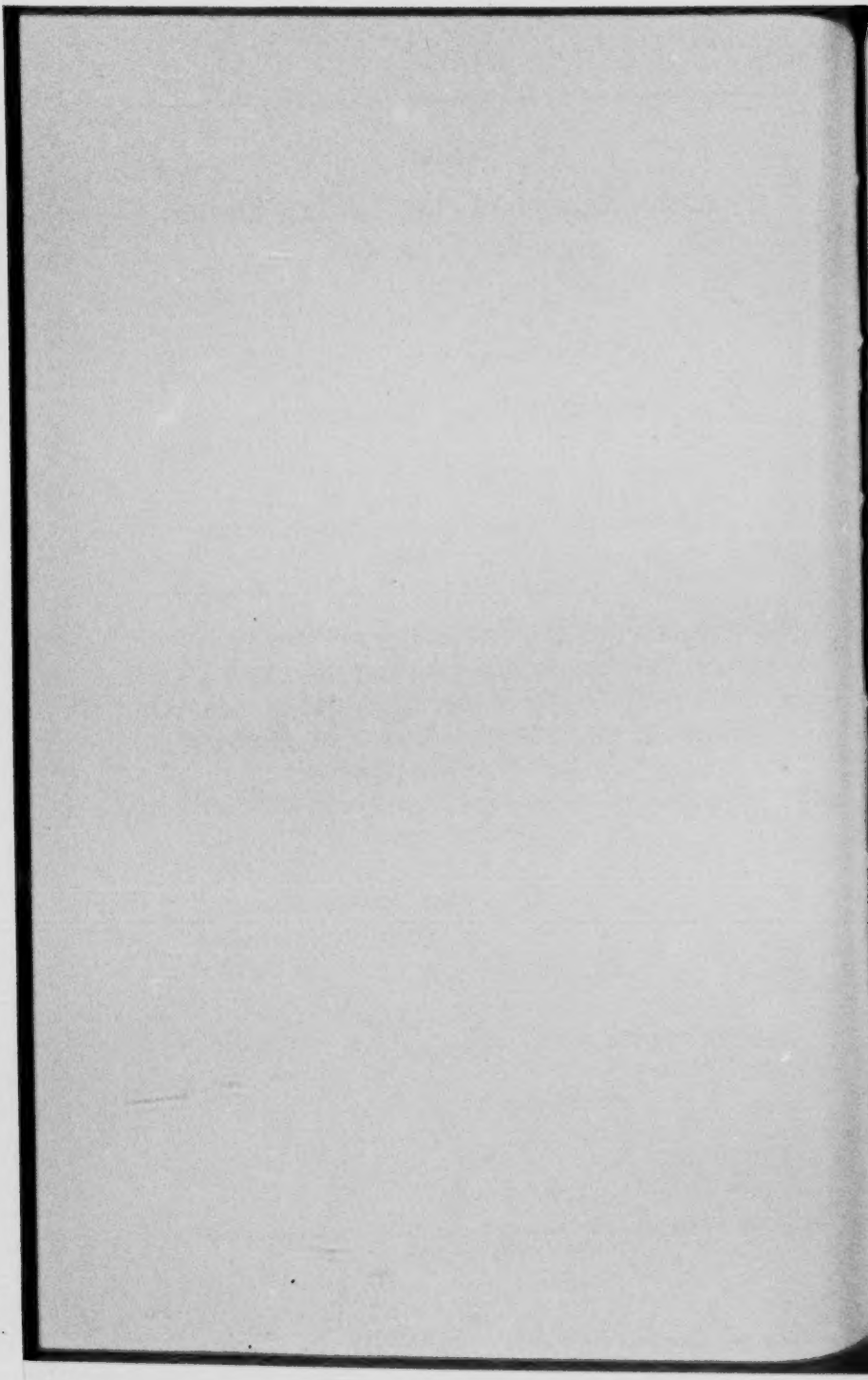

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Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition herein is an application by Marjorie Fleming Lloyd-Smith for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. That Court held:

"The third sentence of Rule 17(b)" of the Federal Rules of Civil Procedure gives to a receiver such as the respondent, "capacity to sue in a foreign district court" (R. 38).

The court, as detailed in the Statement below, made no decision on the question whether the respondent was "vested" with sufficient title to sue under the practice heretofore followed in the courts of the United States, but rather assumed for the purposes of argument, that he did not have adequate title.

The Question Involved

The brief of the petitioner sets forth the "question involved" on page 8. This question, which is a broad one, is particularized by the "specifications of error" (p. 8) and by the four point headings (pp. 8, 10, 12 and 16).

However, the question would be more precisely stated as follows:

Assuming without deciding that the respondent could not maintain this action under the practice heretofore followed in the federal courts, does the respondent have the right to maintain this action under the Federal Rules of Civil Procedure?

It is submitted that the points of this brief amply demonstrate that the foregoing is not a question upon which the issuance of a writ of certiorari may properly be based. Accordingly, we further submit that the petition should be denied.

Opinions Below

The United States District Court for the Eastern District of New York granted the petitioner's motion for judgment on the pleadings in an opinion reported at 29 F. Supp. 929 (1939) (R. 23-28).

The judgment of the District Court was reversed by the Circuit Court of Appeals for the Second Circuit, the opinion being reported in 109 F. (2d) 527 (1940) (R. 37-41).

It is from that reversal, which resulted in the denial of the motion for judgment on the pleadings, that the petitioner seeks to appeal.

Statement

One grave misapprehension is likely to arise from the petition and the supporting brief. It is said on page 10, that the Circuit Court of Appeals, "after quoting the

relevant statutory language", assumed that the Michigan statute did not vest the respondent with title. This, together with the statement appearing on page 9, that the respondent "did not get title to the assets", and the assertion, found on page 2, that the statute in question "did not vest such receiver with title to the assets", is calculated to lead the reader to believe that it has been determined that Mr. Bicknell did not have title to the cause of action alleged herein. Such is definitely not the fact. The Circuit Court of Appeals clearly stated in its opinion (R. 38): "We shall assume *for argument* that the plaintiff's [Mr. Bicknell's] appointment did not 'vest' him with title" (italics ours). In short, the assumption was obviously for the purposes of discussion and in no sense amounted to a determination that title was not vested in the respondent. The remainder of the opinion is similarly devoid of any holding that Mr. Bicknell lacked title to the instant cause of action. Hence, the petitioner's reiteration of Mr. Bicknell's lack of title is merely a claim and not a holding of the court.

POINT I

The issues herein are of such a nature as to require the denial of the petition for a writ of certiorari.

It is the general and accepted rule that the power of the Supreme Court to grant writs of certiorari should be sparingly exercised, and that it should be used only in cases of peculiar gravity and general importance, or to secure uniformity of decision.

Layne & Bowler Corp. v. *Western Well Works,* 261 U. S. 387 (1923), was a patent case involving an infringement situation. After discussing the alleged conflict between the fifth and ninth circuits, the Court found the decisions to be in harmony with each other and that "there was no ground for our allowing the writ of certiorari to add to an already burdened docket" (pp. 392, 393).

The opinion then proceeded to enunciate this important policy of the Supreme Court (p. 393):

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that *it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.*" (Italics ours.)

This proposition was firmly reiterated in *Magnum Import Co., Inc.* v. *Coty,* 262 U. S. 159 (1923). There the Court spoke in the following unequivocal language (p. 163):

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.* Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Italics ours.)

It is respectfully suggested that the petitioner herein is a member of the large group alluded to.

The conclusion reached in these two cases was subsequently reaffirmed in *Keller* v. *Adams-Campbell Co.,* 264 U. S. 314 (1924), where the Court said (pp. 319, 320), with respect to the situation then before it:

> "Such an ordinary patent case with the usual issues of invention, breadth of claims and non-infringement, this Court will not bring here by certiorari unless it be necessary to reconcile decisions of Circuit Courts of Appeal on the same patent. We therefore find ourselves mistaken in assuming that an important issue of general patent law under §4916, Rev. Stats., is here involved. The result is that an order must be entered dismissing the writ of certiorari as improvidently granted at the costs of the petitioner."

It is manifest from the petitioner's brief that no conflict between the circuits is herein involved. In fact, she makes no such contention. Keeping in mind, then, the foregoing principles, let us examine the reasons which she does advance as to "why this Court should grant the writ of certiorari" (pages 3-4 of the petition).

1. The decision below is in conflict with the prior decisions of this Court, stemming from *Booth* v. *Clark,* 17 How. 322 (1854).

2. The decision is in conflict with Rule 66 of the Federal Rules of Civil Procedure.

3. The decision makes a novel distinction between receivers, based upon the sources of their appointment.

4. The decision erroneously construes Rule 17(b) to apply to receiverships.

5. The decision is the first construction of Rule 66 and the first application of Rule 17(b) to a receivership.

6. There are a great number of receiverships and a great number of actions involving the right of foreign receivers to sue.

7. The question is important and requires an authoritative and elucidating opinion of this Court, for otherwise confusion and uncertainty in suits by foreign receivers in federal courts will result.

These "reasons" include within their purview all the specifications of error appearing on page 8 of the petitioner's brief, as well as the four point headings (pp. 8, 10, 12 and 16).

Reason number 1 is the same as the contention advanced in the petitioner's Point I, and it will be discussed briefly by our answer thereto in Point III, below.

Reasons numbers 2, 4 and 5 deal directly with the Rules and will be taken up in Point II, below. Reason number 3 will also be discussed therein.

Reasons numbers 6 and 7, which are interrelated, can be dealt with most conveniently at this juncture.

While there are many receiverships and suits by foreign receivers, as reason 6 states, and while the question involved herein is therefore of some importance (see reason 7, page 5), none of these factors has ever been adjudicated to be of sufficient gravity to sustain a petition for certiorari. The remainder of reason 7 would have to be demonstrated to show the petitioner to be entitled to the relief sought herein. However, no proof is advanced to show that "an authoritative and elucidating decision from this Court" is necessary to avoid "confusion and uncertainty."

Since the Circuits are admittedly not in conflict, there is neither confusion nor uncertainty. While the District Court was reversed, that fact has never been held to be of such force as to justify a writ of certiorari. *Indeed, it is significant, when one considers the foregoing cases, that the petitioner has cited no authority to show that this is the kind of case in which a writ of certiorari should be granted.*

Moreover, the statement that the Federal Rules of Civil Procedure are here involved is not a cogent reason, for, as we shall show in Point II, below, the rules involved herein are crystal clear as drawn by this Court and do not require a supplementary opinion to inform the bar of their meaning.

Furthermore, where, as here, the case does not fall within that class which should be determined by the Court of last resort, that tribunal deems it an obligation not to consider it on the merits. In *United States* v. *Rimer*, 220 U. S. 547 (1911), the Court declared (p. 548):

> "After giving the matter most careful consideration *because of the precedent as to future cases* which must arise from the action we take in this, we have concluded that, under the conditions which we have stated, *our duty is* not to pass upon the merits of the case, but *to dismiss the writ of certiorari.*" (Italics ours.)

To grant the writ in the instant situation, we submit, would, under the *Rimer* case, require this Court to afford similar relief to every litigant whose case involved the Federal Rules of Civil Procedure and whose District Court judgment had been reversed by the Circuit Court of Appeals, for the petitioner has shown no basis for requesting this Court to consider the instant case, other than the reversal and the fact that the said rules are involved herein.

POINT II

The Circuit Court of Appeals correctly applied the Federal Rules of Civil Procedure.

Points II and IV of the petitioner's brief and reasons numbered 2, 4 and 5, above, deal with the Federal Rules of Civil Procedure. The two rules involved herein, to wit, 17(b) and 66, are set forth in full on page 11 of the petitioner's brief and will not be repeated here.

In Point II (pages 10-12) the petitioner urges that there was "no intent" to have the Rules change the former practice. To sustain this contention, the petitioner advances three arguments:

(a) Rule 66, by its terms, declares the practice as to receivers is unchanged (p. 11). The fallacy in this

argument is exposed when one reads the rule and finds that it refers to "administration of estates by receivers or by other similar officers *appointed by the court*" (italics ours). Hence, by the specific limitation placed in the rule as drawn by this Court, the old, formalistic practice was preserved only as to receivers *appointed by the court.* Other receivers (such as the respondent, who was appointed by the Michigan Banking Commissioner), fall under Rule 17(b) which, after referring to corporations and to individuals who are *not* acting in a representative capacity, provides that "in all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held". It is undisputed that this action could be maintained by the respondent under the law of New York, and that this action was brought in the United States District Court for the Eastern District of New York.

As stated by the Circuit Court of Appeals in its decision (R. 39):

> "Nor can we see how the defendant escapes the requirement that at least *some court* shall appoint the receiver; *we can find no underlying purpose in the rule* [*66*] *to induce us to disregard this explicit limitation,* assuming that any such would serve, if we could." (Italics ours.)

It is therefore clear that Rule 66, by its terms, has no application to the instant case, and no "intent" can be found to subvert the express language used.

(b) The petitioner also urges that the Hearings of the Judiciary Committee of the House of Representatives indicate no intention to change the law (p. 12). An inspection of the discussions alluded to will show that Mr. Tolman (the witness whose testimony is referred to) stated that Rule 17(b) did not change the law *on the amenability of labor unions to suit.* There is no basis in the testimony taken in those hearings for alleging that Rule 17(b) did not change the law on other matters.

(c) Finally, the petitioner invokes the authority of "Moore's Federal Practice" (p. 12). But even the quotation from that work which counsel set forth verbatim is expressly limited to "*chancery* receivers" (see third line of quotation on page 12 of petitioner's brief), i. e., receivers appointed by the court. Hence this text book supplies no "intent" which can be attributed to the rule makers to change the obvious meaning of the words they used.

Many more reasons could be advanced to show that the nebulous and invalid bases upon which counsel predicate their claim of "no intent to change the old practice" are inadequate to overcome the clear wording used by this Court in drawing the rules in question. Since this is a brief in opposition to a petition for certiorari, and not an argument on the merits, we shall mention only one such reason.

Rule 66 is one of the eight rules (64-71) which fall under Section VIII of the Federal Rules of Civil Procedure. Section VIII is entitled "Provisional and Final Remedies and Special Proceedings". Hence it is clear that Rule 66 refers to a provisional remedy, a final remedy or a special proceeding. In any of these three events, it refers exclusively to a proceeding before a court, for if the receivers alluded to in Rule 66 are appointed in connection with a provisional remedy (as we shall show below) or in connection with a final remedy or a special proceeding, they must, of necessity, be appointed by a court. To state that the appointment of a receiver by an authority other than a court is a provisional remedy, a final remedy or a special proceeding, is to exhibit a basic ignorance of the most elementary terminology of the law.

It is not to be assumed that the Supreme Court of the United States is chargeable with such a lack of understanding. On the contrary, it is evident that when adopting Rule 66 this Court, in setting up provisional and final

remedies and special proceedings, referred to receivers appointed in connection with such remedies or proceedings, i. e., receivers appointed by the court.

The foregoing discussion prescinds from a consideration of the precise nature of the receivership taken up in Rule 66, and shows that the rule can refer only to receivers appointed by the court, irrespective of whether there is involved a provisional remedy, a final remedy, or a special proceeding. However, we respectfully submit that the rule refers to the provisional remedy.

In New York there are four provisional remedies, arrest, attachment, injunction and receivers. 7 *Carmody's New York Practice* (2d ed. 1932) 2. Provisional remedies are the first group named in Section VIII of the Federal rules. The first rule thereunder (64) is entitled "Seizure of Person or Property", thus corresponding to arrest and attachment. The next rule (65) is "Injunctions", again conforming to the New York pattern of provisional remedies, and then follows Rule 66 entitled "Receivers". (Rule 67 proceeds to a matter other than provisional remedy, viz., "Deposit in Court".) Consequently, it is apparent that Rule 66 refers to the provisional remedy of receivers and has no application to receivers appointed by the executive branch of the government.

Accordingly, we see that Rule 66 was intended to relate to only those receivers who were appointed by a court, and that the petitioner is in error in her Point IV when she alleges that the rule has been misconstrued by the Circuit Court of Appeals. Moreover, Point IV urges (as does reason 3, set forth on page 5, *supra*) that the decision below has "created a novel and extraordinary distinction between a receiver appointed by a court and a receiver appointed by a State administrative officer." We prescind from the point that it may be that no such distinction exists, since the court left open the question of whether the words "*administration of estates*" in Rule 66, are broad enough to cover *the institution of a*

suit by a foreign chancery receiver. Waiving the point, then, that Rule 66 may not even cover the institution of an action by a *chancery* receiver, and assuming that the above-mentioned distinction has been made, it was created not by the decision below, but by the rules formulated by this Court. Hence the disparagement which counsel direct toward that distinction is in reality for the rules themselves.

It is, of course, natural, that counsel should be dissatisfied with the rules, since they were promulgated to discourage formalistic defenses, and the ground upon which the petitioner has sought to dismiss the complaint is manifestly unsubstantial, since the objection interposed is that the respondent did not have an ancillary appointment made in New York before he brought this action. Upon such a claim it is sought to defeat a suit for over $36,000. It is submitted that the formalism of *Booth* v. *Clark, supra,* the eighty-six year old case upon which counsel rely, was one of the very things which the Federal Rules of Civil Procedure were supposed to eradicate.

We therefore respectfully submit that the Circuit Court of Appeals correctly applied the Federal Rules of Civil Procedure herein.

POINT III

The decision below is not in conflict with the prior decisions of this court.

Point I of the petitioner's brief and reason 1, set forth on page 5, *supra,* state that the decision below is in conflict with *Booth* v. *Clark, supra,* and the cases that follow it. Such a contention is an obvious error. At the outset it must be realized that *Booth* v. *Clark* involved a *chancery* receiver, a receiver appointed by a court. Such receivers, unlike a statutory receiver, lacked sufficient title to sue in a foreign jurisdiction, under the practice heretofore followed. Accordingly, if one *assumes for the*

sake of argument, as did the court below, that the respondent was not vested with sufficient title to sue outside the state of his appointment, under the practice heretofore followed, then the Circuit Court of Appeals reached a different result than did this Court in *Booth* v. *Clark.* However, the decision below does not seek to overrule this Court, but merely follows the new rules, whereby this Court itself changed the practice as to receivers who (1) are appointed by some authority other than a court, and (2) are not vested with such title as is required by the case of *Converse* v. *Hamilton,* 224 U. S. 243 (1912), for a receiver to sue in a foreign jurisdiction.

Hence the decision below cannot in any proper sense be said to be in conflict with *Booth* v. *Clark* and the cases stemming from it.

Finally, the petitioner's Point III asserts that "the decision of the Circuit Court of Appeals is in conflict with the prior decisions of this Court which show that the curtailment of the extra-territorial powers of receivers is not a matter of capacity to sue." On pages 12-15 of their brief counsel undertake to demonstrate this proposition. Nevertheless, the lengthy quotations from *Booth* v. *Clark, supra,* and *Great Western Mining Co.* v. *Harris,* 198 U. S. 561 (1905), fail to produce even an intimation that this Court considers the right of a foreign receiver to sue to be a matter of "receivership administration" (as the petitioner would have us believe) rather than a matter of capacity to sue. The third and last case quoted and discussed by the petitioner is *McCandless* v. *Furlaud,* 293 U. S. 67 (1934). That case involved an objection to an ancillary receiver's capacity to sue. It was distinguished from *Booth* v. *Clark,* as counsel contend, but the distinction was based upon the ground that in the *McCandless* case an ancillary receiver was appointed, whereas in *Booth* v. *Clark* no such ancillary appointment was made.

It is therefore manifest that the distinction made between these two cases is not at all indicative of a

holding to the effect that the objection in *Booth* v. *Clark* was not an objection to the plaintiff's capacity to sue. Moreover, nowhere in petitioner's copious quotations is there found a statement to support her claim that the question involved in *Booth* v. *Clark* or similar cases is a matter of "receivership administration."

Consequently, it is evident that the decision below is not in conflict with the decisions of this Court which established the practice heretofore followed in the Federal Courts.

CONCLUSION

Since neither of the two Points (II and IV) made by the petitioner with respect to the Federal Rules of Civil Procedure is valid; since neither of the two remaining Points in her brief (dealing with the alleged conflict between the holding below and the prior decisions of this Court) can be supported; and since all seven reasons urged as grounds for granting a writ of certiorari have been demonstrated to be without force, it is submitted that, in view of the limitations placed upon the issuance of the writ by decisions of which those cited in our Point I are typical, the petition for a writ of certiorari in the instant case should be denied.

Respectfully submitted,

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